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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

No. 10.

OCEAN BEACH HEIGHTS, INC., NORMANDY BEACH DEVELOPMENT COMPANY, ET AL., PETITIONERS,

VS.

THE BROWN-CRUMMER INVESTMENT COMPANY, TOWN OF NORTH MIAMI, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF TOWN OF NORTH MIAMI, ET AL., RESPONDENTS, OTHER THAN THE BROWN-CRUMMER INVESTMENT COMPANY.

T. J. BLACKWELL,
A. Y. CLEMENTS,
W. H. WALKER, JR.,
19th Floor Congress Bldg.,
Miami, Florida,

A. Frank Katzentine
of counsel

Solicitors for Town of North Miami, et al., Respondents, other than Brown-Crummer Investment Company.

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I.

OPINIONS BELOW.

The questions passed on by the Circuit Court of Appeals in the decision of which the petitioners for certiorari now complain, were first presented to the

United States Circuit Court of Appeals in the case of *Normandy Beach Development Company* v. *United States ex rel. Brown-Crummer Investment Company,* 69 Fed. (2d) 105. The Court dismissed the appeal, however, without passing on the questions involved. Although the dismissal of the appeal had the practical effect of affirming the judgment below, the judgment-plaintiff was unable to enforce the judgment without the aid of a court of equity, and the chancery suit, with which the Court is now concerned, was subsequently brought. The present petitioners moved to dismiss the bill of complaint in the District Court, but their motion was denied, as will appear from *Brown-Crummer Investment Company* v. *Town of North Miami, et al.,* 11 Fed. Supp. 73. After final decree against the present petitioners, the appeal to the Circuit Court of Appeals for the Fifth Circuit, was entered, and the lower court was affirmed. The opinion of the Circuit Court of Appeals is reported at pp. 978-981 of 87 Fed. (2d).

The opinion of the District Judge on the final hearing has not been reported but appears at pp. 378-389 of the transcript of the record, and refers to his former opinion in the mandamus proceedings by the *United States ex rel. Brown-Crummer Investment Company* v. *Town of North Miami; et al.,* reported at p. 73 of 11 Fed. Supp.

II.

STATEMENT OF THE CASE.

The "Statement of the Case" in petitioners' brief is not satisfactory, in that, it contains certain inaccuracies and omits certain facts that are deemed material to the consideration of the questions presented, and, therefore, we supplement said statement, as follows:

The petitioners' brief fails to state that the General Improvement Bonds, referred to, were duly validated by decree of the Circuit Court of Dade County, Florida, as provided by law; and at p. 5 incorrectly states:

> "By a general recital the injunction was restricted to taxes levied for debt service,"

whereas, said final decree specifically provided:

> "that the foregoing injunction shall not be construed as restraining the said defendants (petitioners here) and others from enjoining, or otherwise restraining, or preventing the levy, assessment and collection of taxes for any purpose *other than the payment of the bonds and coupons of said Town,* and shall not be construed as restraining E. B. Leatherman, as Clerk of the Circuit Court of Dade County, Florida, or his successors in office, from refusing to enforce the tax certificates for any sums due to the said Town, except such sums as may be levied for the payment of the principal and interest of *said bonds,* and shall not be construed as enjoining said defendants, Town of North Miami, and its officers and agents (the respondents herein) from refusing to levy, assess and collect taxes for any purpose other than the payment of the judgment of the complainant and the bonds and coupons issued by said Town" (R. pp. 394-395).

The essential facts of this case, as shown by the record, are clearly and succinctly stated in the opinion of the Circuit Court of Appeals (R. pp. 427-435) reported at pp. 978-980 of 87 Fed. (2d). For the sake of brevity, they will not be repeated here in detail. However, it may be mentioned at this point that at the time the Town of North Miami was incorporated, southern Florida was experiencing one of the greatest real estate "booms" in history. Villages, towns and cities were expanding phenomenally. Outlying areas were rapidly being subdivided and platted for building purposes, and were being miraculously improved with streets, sidewalks, water mains and other utilities.

At the time of the incorporation of the Town, more than two thousand people lived in the area included within the corporate limits (R. 197), but only forty-nine of them (R. 93) were registered voters, so great had been the sudden influx.

The area originally included within the corporate limits of the Town of Miami Shores (now North Miami) was indented by the upper reaches of Biscayne Bay (R. 83). The northeast corner of this area is separated from the peninsula (petitioners' lands) by a narrow body of water known as the East Coast Canal, with Biscayne Bay extending southward in triangular shape. The causeway referred to in the opinion, and elsewhere, throughout the record, would have extended from the mainland eastward to the peninsula at a point just north of the inlet marked "Baker's Haulover Cut" on the map marked "Ocean Beach Heights Exhibit A" (R. 83), and it will be observed

from the engineer's scale that its length would have been approximately one mile.

On February 5, 1926, the registered voters of a community in Dade County, Florida, north of the City of Miami, met, held an election and organized a municipal corporation named "Town of Miami Shores," under and pursuant to Sections 2825-2828 of the Florida Revised General Statutes of 1920, the General Municipal Corporation Act of the State, printed in full in appendix to this brief (R. p. 92).

The validity of the statute has never been questioned and same is now embraced in Sections 2935-2938, inclusive, of the C. G. L. of Fla. 1927. Organization of the Town was in compliance with the terms of the Act (R. pp. 92-102). No objection was made by voters or any property owner to the organization (Master's Rep., p. 370).

The boundaries stated in the publication of notice to assemble and organize, and fixed at the organization meeting, included land on both sides of Bay Biscayne (R. p. 92). After incorporation, the Council authorized several issues of bonds (R. pp. 4 and 5). Before selling said bonds, they were duly validated by legal proceedings in accordance with the statutes of the State of Florida, in such cases made and provided. The bonds contained usual recitals of authority and usual pledge that taxes would be levied annually upon all taxable property within the Town (Ex 4, p. 295 R.).

A certificate of validation was duly endorsed on the bonds and the proceeds were used to construct public improvements (Master's Rep., p. 370).

Among the public improvements undertaken was a causeway or bridge, which would connect the two parts of the Town (R. p. 147). The officials of the Town exercised municipal power over the entire area, both east and west of the Bay, until 1932 (Master's Rep., pp. 368-369). Even the petitioner recognized the authority of the Town by applying for leave to change the location of a street (R. pp. 237-239). Building permits were issued (R. pp. 161 and 190), fire and police protection furnished (R. p. 95) and garbage collections made (R. pp. 181-182). Taxes were levied and paid without protest (R. pp. 185-186) until 1931.

When the Town was incorporated in February, 1926, neither petitioners nor anyone owning lands east of Biscayne Bay raised any objections to their lands being included within the corporate limits of the Town; nor to the issuance, validation, or sale of general municipal bond issues to raise money for the construction of causeways and other municipal improvements. But, as history records, the Florida "boom" came to an abrupt end, and petitioners and others owning property east of the Bay, in 1929, instituted a *quo warranto* proceeding in the Circuit Court of Dade County to exclude all of the land located east of the Bay (R. p. 84, *et seq.*).

At an extraordinary session of the Legislature of Florida, in 1931, the name of the municipality was by Special Act changed from "Town of Miami Shores" to "Town of North Miami." The Florida Legislature also enacted certain special laws for this municipality in 1927, in 1929 and in 1931, as was known to all persons, and the status of the municipality was thus recognized and

confirmed by the Legislative Department of the State of Florida (see Chap. 13, p. 103 of the Spec. Acts of 1929; Chap. 14, p. 237 of the Spec. Acts of 1929; Chap. 15, p. 347, Chap. 15, p. 822, Chap. 15, p. 823 of the Spec. Acts of 1931). The municipality was also recognized by the Judicial Department of the State of Florida in the validation of bond issues as hereinbefore mentioned.

At the time of the organization of the municipality there existed in Florida, as a part of the general law, a statute enacted by the Legislature to the effect that the jurisdiction of all cities and towns organized under the general law should extend to and over the water of all rivers, creeks, harbors and bays contained within the corporate limits. The statute in question was Section 1833 of R. G. S. of Fla., 1920, and is still in force as Section 2943 of the C. G. L. of Florida, 1927, which we quote, as follows:

> "The jurisdiction of said cities and towns and the authority of the officials thereof, shall be held to have full force and effect over the waters of all rivers, creeks, harbors or bays, contained within the corporate limits."

Accordingly, the incorporators included within the territorial limits, as a part of the corporate area, a part of several bodies of water; namely, the upper reaches of Bay Biscayne, a canal flowing into the Bay, Arch Creek, and other canals. All of the land contained within the corporate limits was not connected, but the disconnected areas were not separated from each other by excluded land. Stated differently, the entire area contained within the corporate limits was contiguous ter-

ritory when the term "territory" is used in such sense as to include the Bay bottom and the beds of the streams mentioned.

Long after the bond issues had been validated and sold, and after the municipality had been recognized by the Florida Legislature, and notwithstanding the provisions of Section 1833 of the R. G. S. of Florida, 1920, relative to the jurisdiction of cities and towns over waters within their limits, Attorney General of Florida on August 12, 1929, filed in the Circuit Court of Dade County, an information for a writ of *quo warranto* setting forth that the Town of North Miami, and its officers, unlawfully exercised jurisdiction over the territory included within the original corporate limits lying east of Bay Biscayne, as well as certain islands, the principal ground for the assertion being that the lands last mentioned were not contiguous to the mainland or the principal portion of the area comprising the municipality. That is to say, that the lands lying in Bay Biscayne and the lands lying east thereof, were not connected and did not touch, and hence, were non-connecting and unlawfully included in the corporate area (R. 84).

Afterwards, on December 18, 1931, a judgment was entered in the *quo warranto* proceeding above mentioned by judge of the Circuit Court of Dade County, ousting the municipality and prohibiting its officers from exercising the offices, franchises and privileges of a municipality over such territory. The judgment contained a recital to the effect that all that portion of the "purported" Town of Miami Shores (North Miami), lying

east of Bay Biscayne, never was legally incorporated in the Town and never was a part thereof, and the attempted inclusion thereof was illegal, null and void (R. 355).

Prior to the entry of the last mentioned judgment purporting to divide the municipality, or detach a part of the lands of the interveners (petitioners), the Circuit Court entered (1) a judgment of ouster in the same proceeding dated March 27, 1930, but that judgment of ouster was reversed by the Florida Supreme Court on writ of error (*Mahood, et al.* v. *State, ex rel. Davis,* 101 Fla. 1254, 133 So. 90).

The reversal of the first judgment restored the Town of North Miami to the position it was in before judgment, and the municipality continued as, at least a *de facto* corporation, in the exercise of jurisdiction over all of the original area.

A second judgment of ouster was entered in the lower court (R. p. 353) from which no appeal was taken. The only parties to that action were the taxpayers and the two officials (see Ex. R. pp. 302-360).

In the meantime, the Brown-Crummer Investment Company, as holder of past due bonds and coupons, obtained a judgment in the United States District Court and also, an alternative writ of mandamus (R. pp. 204-210), requiring the Town to levy a tax on all taxable, assessable property located within the original boundaries of the Town (R. p. 208). Petitioners and other tax-

payers attempted to intervene. Testimony was taken and a peremptory writ issuing (R. p. 204, *et seq.*), an appeal to the Circuit Court of Appeals was attempted, but was dismissed on the grounds that the appellants (petitioners here) were not proper parties to the mandamus, 69 Fed. (2d) 105.

However, subsequent to the entry on December 18, 1931, (Tr. p. 353) of the second judgment of ouster, by the lower court, from which no appeal was taken, it relinquished its claim to the land east of the median line of Bay Biscayne, pursuant to the mandate of the Dade County Circuit Court.

As the peremptory writ required the Town to levy taxes on the lands east of the Bay, as well as on lands west of the Bay, for the payment of the judgment, Brown-Crummer Investment Company filed its Bill of Complaint: (1) to protect the town officials from the effect of the judgment of ouster, and thus, make effective the peremptory writ of the Federal Court; (2) to enjoin the petitioners, and other taxpayers, who had instituted proceedings in the State Court, from interfering with the future levy and collection of taxes for the payment of the judgment, and any bonds which the town had issued (R. 1).

III.

ARGUMENT.

(Note: Italics ours unless otherwise indicated.)

POINT A.

Where decisions of State Courts affect and impair the enforcement of municipal bonds held by non-resident bond owners (valid contracts between citizens of different states), which were issued and validated before such State Court decisions were rendered, can the courts of the United States, by injunction, control the operation, application and effect of such State Court decisions, in order to prevent such impairment (pursuant to Section 10, Article 1 of the Constitution), and grant protection to the officers of the municipality from threatened punishment for contempt of said State Court decisions?

Manifestly, the foregoing question was properly answered in the affirmative, by both the United States District Court and the United States Circuit Court of Appeals for the Fifth Circuit.

In the recent case of the *City of Winter Haven, Fla.* v. *Gillespie, et al.*, 84 Fed. (2d) 285 (decided June 10, 1936), reviewing on appeal a final decree in favor of the bond holders, entered in the District Court of the United States for the Southern District of Florida, in which the allegations of the bill of complaint were, in most particulars, identical with those in the case at bar, Judge Hutcheson, speaking for the court, said:

> "Testing its appeal by that rule, we think it plain that the decree should be affirmed, for it clearly appears from the bill that as to the bonds and the

territory in question, everything the state required to be done was done to validate the bonds before they went into the hands of innocent purchasers. There was even a judgment in a plenary validating proceeding establishing their validity. *Greene* v. *Uniacke* (C. C. A.), 46 F. (2d) 916; *Sparks* v. *Ewing*, 120 Fla. 520, 163 So. 112; *City of Winter Park* v. *Dunblaine, Inc.*, 121 Fla. 600, 164 So. 366; *State, ex rel. Fidelity Life Ass'n* v. *City of Cedar Key* (Fla.), 165 So. 672.

"Under these circumstances it may not be doubted that under both state and federal decisions the annexed territory remains liable for the bonds, and must pay them; for the defect for which the judgment of ouster was entered went, not at all to the power of the Legislature under Constitution, but to a defect in the form the exertion of the power took. The ouster proceeding was, therefore, without effect as to these bonds. *For their servicing the City of Winter Haven remains constituted as it was constituted when the bonds were authorized and issued, the officials remain obligated as they were then obligated to act in their servicing.* This is the rule of the federal courts. It is the rule of the state courts. It is especially the rule in Florida. *State, ex rel. Fidelity Life Ass'n* v. *City of Cedar Key, supra; Mobile* v. *Watson*, 116 U. S. 289, 305, 6 S. Ct. 398, 29 L. Ed. 620; *Shapleigh* v. *San Angelo*, 167 U. S. 646, 17 S. Ct. 957, 42 L. Ed. 310; *Payne* v. *First Nat'l Bank* (Tex. Com. App.), 291 S. W. 209; *c/f Board of Public Instruction for Polk County* v. *Gillespie* (C. C. A.), 81 F. (2d) 586; *City of Decatur* v. *Thames B. & T. Co.* (C. C. A.), 84 F. (2d) 105."

Another case involving similar facts is that of *Clapp* v. *Otoe County*, 105 Fed. 473, decided by the United States Circuit Court of Appeals for the Eighth Circuit, in 1900, the opinion being by Judge Sanborn. There, a conflict

existed between the judgments of the state and federal courts relative to a mistake of boundaries, and liability for taxation, of a *de facto* organization. It was there said:

> "When these bonds were issued and sold, *every citizen of the territory* comprised within the order of October 4, 1886, and called 'Nebraska City Precinct' and *every piece of property therein,* was represented by the Board of County Commissioners of Otoe County, in all the proceedings which culminated in the issue of these bonds. *That board was the agent of these citizens and this property, under the statutes, to borrow the money which they voted to obtain upon the bonds.* Under the color of law, it constituted the precinct, called the election, issued the bonds, and no man objected. Under these circumstances, Nebraska City Precinct was a precinct *de facto* and the board of county commissioners were its governing officers *de facto,* and the silence and general acquiescence of the private citizens within it and the officers of the state and county, until after the rights of the bondholders had vested, estop them from questioning the acts of these officers, as against the purchasers of the bonds. The acts of these officers have all the force of the acts of officers *de jure* for a precinct legally constituted, *and the owners of the property within the boundaries of the order of the board of county commissioners of October 4, 1886, are estopped, by their silence and acquiescence, from denying that the property within those limits is liable to taxation to raise the necessary amount to pay these bonds.*"

In an earlier part of the opinion in that case, it was stated:

> "A state court may not by injunction prevent a federal court from proceeding to judgment in an action of which it has jurisdiction, or from en-

forcing its judgment by a mandamus to compel the levy and collection of taxes to pay it. *Holt Co.* v. *National Life Ins. Co.*, 80 Fed. 686, 691, 25 C. C. A. 469, 474, 49 U. S. App. 376, 385; *Riggs* v. *Johnson Co.*, 6 Wall. 166, 18 L. Ed. 768; *Supervisors* v. *Durant*, 9 Wall. 415, 19 L. Ed. 732; *Hawley* v. *Fairbanks*, 108 U. S. 543, 2 Sup. Ct. 846, 27 L. Ed. 820."

Therefore, it is obvious that the Circuit Court of Appeals properly held that the District Court ruled correctly in denying the petitioners' motion to dismiss, and in retaining jurisdiction over the case for the purpose of granting, upon proof of the allegations of the bill, the relief ultimately provided for in the final decree (Tr. 389).

POINT B.

The Circuit Court of Appeals of the United States properly affirmed the judgment of the District Court in holding that the *quo warranto* proceeding in the State Court ousted the jurisdiction of the municipality as to lands east of Biscayne Bay prospectively only —without deciding whether said territory could be taxed to discharge its proportionate part of the municipality's bonded indebtedness incurred prior to the judgment of ouster.

The Supreme Court of Florida has stated that *quo warranto* is a remedy the office and scope of which depends on the use and limitations authorized by the common law of England as of the date of the adoption of the common law in Florida, there having been no subsequent modification either of a statutory or judicial character. We refer to the case of *State ex rel. Landis*,

Attorney General v. *Pravatt* (110 Fla. 29), 148 So. 578, 580, from which we quote the following:

> "'*Quo Warranto*' is defined by Blackstone (3 Com. 262) to be 'in the nature of a writ of right for the King against one who claims or usurps any office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right,' *and this definition clearly imports the limitations and extent of the remedy.*
>
> "In the instant case the information was filed against the defendants as individuals, for exercising the office, franchise, or privilege of Board of Trustees of Volusia County Fair, and not against the corporation as such. In cases where the action is brought against individuals, usurping or intruding into any office or franchise, or of unlawfully holding the same, a judgment of ouster should be rendered; but where the proceeding is against a corporation, and a conviction follows for non-user, misuser, or long neglect of a liberty, franchise, or privilege, it appears that a judgment of ouster and dissolution should be rendered, which is equivalent to a judgment of seizure at common law. 22 R. C. L. 724 In *King* v. *City of London*, 2 T. R. 522, the rule is stated to be this: *When it clearly appears to a court that a liberty is usurped by wrong and upon no title, judgment of ouster only shall be entered. But when it appears that a liberty has been granted, but has been misused, judgment of seizure into the King's hands shall be given.* 51 C. J. 361, states the rule to be: '*Under its common-law powers, the court in granting relief against one exercising an office, will go no further than to oust the wrongful possessor of the office.*' • • •
>
> "• • • The *only* question to be determined by this action is whether the defendants are usurping a liberty, franchise, or privilege, without authority of law. This limitation of the scope and ex-

tent of the relief afforded in the proceedings in the nature of *quo warranto* was sustained in *Albright* v. *Territory,* 13 N. Mex. 64, 79 P. 719, 11 Ann. Cas. 1165, and *State ex inf. Pope ex rel. Oberholser* v. *Mansfield Special Road District,* 299 Mo. 663, 253 S. W. 714."

In Corpus Juris, Volume 51, page 361, paragraph 84, it is said:

"In a proceeding against a corporation the court may enter a judgment of ouster as to the corporate franchise *or merely as to particular powers;* and if the corporation is dissolved the court may order incidentally that the officers shall no longer exercise the functions of their offices; *but the forfeiture of the franchises of the corporation and the ouster of its officers from the exercise of official power constitute the limits of the relief which may be granted.*"

Even in the absence of the foregoing rule, the conclusions of the state court would *not be binding* on the *bond holders,* in the present suit, *as they were not parties* to the *quo warranto* proceedings, and neither were they parties to the injunction suit now referred to as the case of *Leatherman, Clerk* v. *Alta Cliff Company, both of which cases were disposed of by the state courts on questions of fact.*

In the case of *Mahood, et al.* v. *State ex rel. Davis, Attorney General,* 101 Fla. 1254, 133 So. 90, decided March 21, 1931, it was said:

"We could affirm the judgment of ouster were it not for the fact that the answer alleges, '*It is denied that said territory is not a part of the community of Miami Shores, and that is far removed and isolated from* the community.' This allegation tra-

verses the allegation of the information to the effect that the territory sought to be affected by the information was not a part of the community of Miami Shores. *This presents a question of fact which the respondents are entitled to have tried by a jury, and, until the truth in regard to that fact has been ascertained, it is not needful to discuss other questions raised by the pleadings.*"

In *Leatherman, Circuit Court Clerk* v. *Alta Cliff Company,* 114 Fla. 305, 153 So. 845, decided March 21, 1934, the Florida Supreme Court observed that:

"Our mandate reversing the cause was issued pursuant to the opinion and judgment being filed on March 24, 1931. After the going down of the mandate, the Circuit Court entered an order wherein and whereby the city officers and the Town of North Miami, formerly known as the Town of Miami Shores, were each and all ousted, excluded, and prohibited from exercising municipal functions over the territory in which the lands here involved are embraced.

"The ouster of jurisdiction was necessarily based upon the finding and adjudication that there had never been any authority in law for the inclusion of the territory east of Biscayne Bay within the corporate limits of the Town of Miami Shores, and, if there had never been any lawful authority for the inclusion of that territory within the municipality, then the municipality never acquired any *de facto* or *de jure* jurisdiction over the lands embraced in that territory."

The state courts could try *only* the cases submitted to them by the litigants. The *only* question presented for determination in the *quo warranto* proceedings was whether the municipality was a *de jure corporation.*

Whether their conclusions were based on the same showing of facts as in the case at bar is purely a matter of speculation, but even if identical, the *fact findings* of the state courts were not binding on the District Court of the United States, or any other Federal Court.

In any event, if the state courts had before them the same facts as shown by the evidence in the case at bar, the judgments rendered were out of harmony with the view expressed in the case of *West* v. *Town of Lake Placid*, 97 Fla. 127, 120 So. 361, wherein Mr. Justice Strum, speaking for the Supreme Court of Florida, said:

> "Where an attempted incorporation of a municipality is an absolute nullity, such incorporation may be collaterally attacked. In this instance, however, acting under at least color of authority from the Legislature found in the passage of Chapter 12990, *supra, this municipality apparently in good faith has taken the necessary steps to put its charter into operation, has elected its officers, has assumed the duties of local government under its charter, and has otherwise engaged in an active user of the franchise—all of which has been acquiesced in by the inhabitants of the municipality until the institution of this proceeding. Thus the municipality has become at least a municipality de facto. Tulare Irr. Dist.* v. *Shepard*, 185 U. S. 1, 22 S. Ct. 531, 46 L. Ed. 773; *Town of Constitution* v. *Chestnut Hill Cemetery Association*, 136 Ga. 778, 71 S. E. 1037; *Cooper* v. *Town of Valley Head*, 212 Ala. 125, 101 So. 874; 43 C. J. 98."

In fact, the situation here presented is similar to that which obtained in the case of *City of Sour Lake* v. *Branch*, 6 Fed. (2d) 355, where the Circuit Court of Appeals, speaking through Judge Foster, said:

"Regardless of the holding of the Court of Civil Appeals as to the City of Sour Lake, it is settled that the incorporation of a town under the laws of Texas is not wholly void *ab inito* because territory unsuitable for town purposes is improperly included within its limits, but is merely voidable. *Shapleigh* v. *City of San Angelo*, 167 U. S. 646, 17 S. Ct. 957, 42 L. Ed. 310. *It is elemental that, with regard to its obligations, a corporation de facto is to all intents and purposes the same as a corporation de jure.* The rule is thus stated by Cook: 'A corporation cannot defeat its bonds and debts by alleging its want of lawful incorporation.' Cook on Corporations (8th Ed.), Par. 637."

This case is also similar, as to the point now under consideration, to the case of *South Houston* v. *Carman*, 6 Fed. (2d) 358, in which it was said:

"There is nothing to distinguish this case in principle from the cases of *City of Sour Lake, et al.* v. *Vernon H. Branch* (No. 4504 on the docket of this court), 6 F. (2d) 355, decided this day and the case of *Shapleigh* v. *San Angelo*, 167 U. S. 646, 17 S. Ct. 597, 42 L. Ed. 310. The irregularity in the attempted incorporation does not seem to have been any greater than that shown in those cases. The administration of the Village of South Houston was illegal, but nevertheless, the commissioners appointed by the mayor were *de facto* officers, occupying *de jure* offices. In *Norton* v. *Shelby County*, 118 U. S., at page 446, 6 S. Ct. 1127, 30 L. Ed. 178, in defining *de facto* officers the court said:

"'An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised.'"

The points of law, as presented by the petitioners' brief, under the "Argument," apparently seek to divert attention from the real issue. For example, Point "A," as stated in petitioners' brief at page 6, is purely hypothetical, irrelevant, misleading, and has no application to the facts of the case at bar, for the reason that the Supreme Court of Florida has never rendered a decision upon the rights possessed by the holders of bonds of the Town of North Miami (formerly Town of Miami Shores) to have taxes levied against property east of the Bay. Both the decisions of the Supreme Court of Florida—*Mahood, et al.* v. *State ex rel. Davis,* 101 Fla. 1254, 133 So. 90, and *Leatherman* v. *Alta Cliff Company, et al.,* 114 Fla. 305, 153 So. 845—relied upon by the petitioners, had as parties, taxpayers *only* on one side, and the town and its officials *only* on the other. These cases, therefore, could not be *res judicata* of the issues involved in the case at bar.

As the Alta Cliff case purports to follow, and to be founded upon, the earlier Mahood case, we will discuss the Mahood case first. There, the Supreme Court of Florida considered the question as to whether the petitioners' lands were properly included as a part of the municipality, in reviewing a judgment of ouster in a *quo warranto* proceeding; it was held that the Town was a legally constituted municipality under the laws of the state, but that Biscayne Bay, which indented the territory and in a large measure separated the western and eastern parts of the Town, was such a disconnection that if the inhabited and built-up portions of the Town were located

on the west side of the Bay, it could not include the lands on the east side of the Bay.

As we feel unable to improve upon the analysis of the *Mahood case* made by the District Judge, in the light of the facts of the case at bar, we will quote from his opinion in the mandamus case, being *United States ex rel. Brown-Crummer Investment Company v. Town of North Miami,* 11 Fed. Supp. 69. It is there said with respect to the Mahood case that:

> "The Court evidently had in mind that the waters of Biscayne Bay was such a division that it could not be considered as being included in the town area and considered only the land as not being contiguous; that is, touching. The land bordered water and the whole area including the bay was within the area of the town. The Court says further: 'We are not prepared to say that the Legislature could not by proper enactment create a municipality embracing an area a part on one side and a part on the other side of a bay of this character, but in this case the Legislature has not attempted to do that.' *The town however did, under general legislative authority, do that very thing.* As hereinafter stated, the necessity for contiguous territory being within the corporate limits has been settled by the Florida Supreme Court in several cases. *Town of Enterprise* v. *State*, 29 Fla. 128, 10 So. 740; *Mahood* v. *State, supra; Town of Boynton* v. *State*, 103 Fla. 1113, 138 So. 639. With these decisions, I do not differ. A town cannot hop, skip and jump over territory taking this piece of land and that piece of land without reference to a united whole. The question before me is whether lands in a duly and legally incorporated town under the provision of sections 2935, 2937, 2942 and 2943, and other applicable sections of the Compiled General Laws of

Florida 1927, under which Miami Shores, now North Miami, was incorporated, and which town did duly and legally issue municipal bonds, can be eliminated thereafter by judicial decree from the levy of a tax to pay a judgment secured upon said bonds on the ground that said lands never had been a part of the territory of said town because in the opinion of the Court in construing the principle back of the statute said lands were not contiguous by reason of being separated by a body of water known as Biscayne Bay. *The contiguous tracts as dealt with by the Florida decisions were with reference to surveyed and plotted or legally described tracts of land absolutely separated by operation of law.* Biscayne Bay is a body of water. *It is not such a tract of land as the said court had under consideration in said cases.* Section 2937 of said statutes expressly says that when the municipal corporation is to be formed thirty days' notice by publicity must be given, 'requiring all persons who are registered voters, residing in the proposed corporate limits, *which shall be stated in this notice,* to assemble at a certain time and place to select officers and organize a municipal government.'

"It is admitted that this procedure was had as thus required. The east side of Biscayne Bay was included in the described territory. That is, the west side of Biscayne Bay and the east side were all taken into the town area as I understand and the admission of the pleadings. Section 2943 says: *'The jurisdiction of said cities and towns, and the authority of the officers thereof, shall be held to have full force and effect over the waters of all rivers, creeks, harbors or bays contained within the corporate limits.'*

"In *Lane* v. *State,* 63 Fla. 220, 57 So. 662, 663, the court says: 'There is no constitutional provision regulating the statutory descriptions of municipal territory • • • under this broad au-

thority it is within the power of the Legislature by valid enactments to prescribe the territorial limits of a municipality as it deems proper when no provision or principle of organic law is violated.'

"'Under section 2937 aforesaid, the Legislature delegated this power to the municipality authorizing it in its organization notice to describe the corporate limits. When a town does this it is a legislative act. *No decision of the Florida Courts has been cited, nor can I find any, dealing with an issue of municipal bonds under the conditions presented in this case.* While the lands involved in this case were thus included in the organization notice of Miami Shores and before the decisions of the state court in *Mahood* v. *State* or the decree of the Circuit Court of Dade County, the bonds in question were duly issued after public notice and election. No protests were made by any of the property owners on the east side of the bay, either at the time of the organization of the town or at the time of the election and confirmation of the bond issue. Three years elapsed after the first issue and more than a year after the last issue and sale of said bonds before any objections were heard, and these came at a time when the owners of the bonds brought suit against the town for judgment on account of default in the payment of principal and interest and when judgment was entered. As set forth in the petition in this case, there is no allegation that there was any fraud in the proceedings or that the purchasers of the bonds were not *bona fide*. The purchasers of the bonds had a right to rely upon the existing statutes as aforesaid and upon the record of the said lands in question being within the town area and being part of the security back of the bonds. The property owners of the land in question had an opportunity to prevent by prompt action just what they are now seeking. The statute was in force giving power in the town to include the waters of the bay and the lands along the same. We

judicially know that towns are constructed with large lakes and rivers and bays within their area and municipal facilities are constructed for the public utilization of and over said waters. Of two innocent parties, bondholders and east side land holders, which shall suffer the loss; which one had the opportunity to prevent the present situation and to protect their rights and neglected to do so causing the court to act? We can only answer that it was the owners of the lands in question. Furthermore, the bond issue was validated by decree of the state court after due notice and hearing. Further by legislative act approved June 8, 1929 (Sp. Acts, Fla. 1929, C. 14237), the bond issue was confirmed, by inference at least. The municipality has received the money for the sale of these bonds and spent it for municipal purposes. The Florida Supreme Court, in *State ex rel. Nuveen* v. *Greer*, 88 Fla. 249, 102 So. 739, 742, 37 A. L. R. 1298, in considering invalid municipal bonds, says: 'The bonds were expressly authorized by statute and were issued as required by the statute. The proceeds were received by the municipality and used for its benefit. The implied limitation that was held by the court to make the issue of the bonds contrary to organic law, was developed by judicial interpretation *after* the bonds had been sold, and the money had been used by the city for its purposes as expressly and specifically authorized by the statute. These circumstances clearly render the municipality liable for the amount of money so received by it, with interest.' Undoubtedly mandamus would lie to compel a city to pay a judgment under this doctrine.

"The limitation on Miami Shores as to the land east of Biscayne Bay being beyond its power to include has been *developed by judicial interpretation after the bonds had been issued and the money therefor used.* The argument of the Court in the above case applies with equal force to the facts in this

case. 'The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' *March* v. *Fulton Co.*, 10 Wall. (77 U. S.) 676, 684, 19 L. Ed. 1040; *Louisiana* v. *Wood*, 102 U. S. 294, 299, 26 L. Ed. 153. I am aware that the Circuit Court of Dade County, Fla., pursuant to a mandate of the Florida Supreme Court in *Mahood* v. *State*, 101 Fla. 1254, 133 So. 90, has decreed that the lands in question never were within the area of the town of Miami Shores or North Miami. I cannot agree with this in so far as to deny liability in this mandamus suit. At the time of the bond issue they were included as I have set forth. On the strength of this inclusion the bonds were sold to *bona fide* purchasers.

"Counsel for respondents urge the decree of the state court as being *res adjudicata* of the question presented and that the court must follow the same. I do not think so. *We are dealing here with a question of general jurisprudence, of commercial law—dealing with municipal securities and the rights of bondholders.* General law must decide the issue. The law of estoppel operates in justice against the respondents. The federal court is not bound by the state decision. Under the circumstances *none of the State cases presented deal with the rights of bondholders under the conditions presented.*

" 'It is an axiom in American jurisprudence that a statute is not to be pronounced void upon the ground that it is in conflict with the Constitution of a state, unless the repugnancy to the Constitution be clear and the conclusion that it exists inevitable.' Every doubt is to be reserved in support of the enactment, * * *. The judicial function involving such a result is one of delicacy and to be exercised always with caution * * *.

"'With all respect for the eminent tribunal by which the judgments were pronounced we must be permitted to say that they are not satisfactory to our minds * * *. The question before us belongs to the domain of general jurisprudence. In this class of cases the court is not bound by the judgment of the court by the state where the case arises. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarters that such statute was invalid, * * * the acquiescence was universal * * *.

"'The National Constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished, unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary.' *Township of Pine Grove* v. *Talcott*, 19 Wall. (86 U. S.) 666, 22 L. Ed. 227; *Board of Com'rs of Stanly County* v. *W. N. Coler & Co.*, 190 U. S. 437, 23 S. Ct. 811, 47 L. Ed. 1126; *Folsom* v. *Township*, 159 U. S. 611, 16 S. Ct. 174, 40 L. Ed. 278; *Burgess* v. *Seligman*, 107 U. S. 20, 2 S. Ct. 10, 27 L. Ed. 359; *Herron* v. *S. P. Co.*, 283 U. S. 91, 51 S. Ct. 383, 75 L. Ed. 857.

"The doctrine of the Federal Courts in cases of this character is expressed in *Bourbon County* v. *Block*, 99 U. S. 686, 699, 25 L. Ed. 491: 'We have not overlooked the opinion delivered by the *Supreme Court of the State* in *Lewis* v. *Commissioners, supra* (12 Kan. 186). The judgment in the case was not

given until after the bonds were issued, and after the rights of the holders thereof had become fixed. We are, therefore, at liberty to follow our own convictions of the law. To those expressed by the state court we cannot assent. They are not in harmony with many rulings of this court made and respected through a long series of years, and they are not such as in our opinion would administer substantial justice if applied to this case.' *Board of Com'rs of Comanche County* v. *Lewis*, 133 U. S. 198, 10 S. Ct. 286, 33 L. Ed. 604."

The Supreme Court of Florida did not hold, in the Mahood case (as petitioners apparently contend) that a *de facto* municipal corporation could not exist with corporate limits extending to and including territory on each side of Biscayne Bay. Further, it did not hold that a *de jure* corporation could not exist including territory on both sides of the Bay. This is very clearly pointed out in the principal opinion of the Circuit Court of Appeals, which the petitioners are asking this Court to review. It is there said:

"The Supreme Court of Florida has not held in the cases cited that if, as a matter of fact, the territory on both sides of the Bay was a part of the hamlet before it was incorporated, it could not be incorporated as a town. Indeed, in the Mahood case it decided the contrary to this. *It definitely held that whether the affected territory was or was not a part of the town, was to be determined as an issue of fact and not of law.*"

In the Mahood case, the trial court first determined that the town was a *de facto* municipality throughout the entire territory (R. 334), and a general judgment of

ouster was entered. The Supreme Court of Florida reversed that judgment, however, holding, in effect, that the town was a *de jure* corporation as to the mainland, or parts thereof, and a *de facto* corporation as to the peninsula or beach area (petitioners' lands), if the inhabited and built-up portions of the town did not extend beyond the mainland. Subsequently, the trial court determined that the lands on the peninsula were not within the inhabited and built-up portions of the town, and entered judgment of ouster in accordance with the mandate of the Florida Supreme Court.

However, in the Alta Cliff case, decided several years later, the Florida Supreme Court held that the judgment of ouster entered in the lower court had a *retroactive effect,* and established that the lands lying east of Biscayne Bay had never been a part of the municipality for any purpose. The Alta Cliff case was decided wholly upon the Mahood case, and the general law with respect to *de facto* corporations, previously recognized as obtaining in Florida, in case of *Town of Enterprise* v. *State,* 29 Fla. 128, 10 So. 740, was wholly disregarded.

Petitioners now assert that the Circuit Court of Appeals has decided an important question of *local* law in a manner probably in conflict with applicable local decisions. Their contentions in this regard are, however, manifestly unsound. First, no question of local law is involved in this case as has been clearly demonstrated in the opinions of the District Court and of the Circuit Court of Appeals. Second, if the Circuit Court of Appeals had attempted to follow the Florida case of *Leatherman* v. *Alta Cliff Company,* its decision would have been in *conflict*

with Florida cases, for the Alta Cliff case itself *conflicts* with both *earlier* and *later* decisions of the Florida Supreme Court. We have already pointed out the conflict between the Alta Cliff case and the earlier Town of Enterprise case. We now refer to the later case of *State ex rel. Landis, Attorney General* v. *Pravatt* (110 Fla. 29), 148 So. 578, 580, from which we quote the following:

> "'*Quo Warranto*' is defined by Blackstone (3 Com. 262) to be 'in the nature of a writ of right for the King against one who claims or usurps any office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right.' *And this definition clearly imports the limitations and extent of the remedy.*
>
> "In the instant case the information was filed against the defendants as individuals, for exercising the office, franchise, or privilege of Board of Trustees of Volusia County Fair, and not against the corporation as such. In cases where the action is brought against individuals, usurping or intruding into any office or franchise, or of unlawfully holding the same, a judgment of ouster should be rendered; but where the proceeding is against a corporation, and a conviction follows for non-user, misuser, or long neglect of a liberty, franchise, or privilege, it appears that a judgment of ouster and dissolution should be rendered, which is equivalent to a judgment of seizure at common law. 22 R. C. L. 724. In *King* v. *City of London*, 2 T. R. 522, the rule is stated to be this: *When it clearly appears to a court that a liberty is usurped by wrong and upon no title, judgment of ouster only shall be entered. But when it appears that a liberty has been granted, but has been misused, judgment of seizure into the King's hands shall be given.* 51 C. J. 361 states the rule to be: '*Under its common-law powers, the court in granting relief against one exercising an office, will go no further*

than to oust the wrongful possessor of the office.'

"* * * The *only* question to be determined by this action is whether the defendants are usurping a liberty, franchise, or privilege, without authority of law. This limitation of the scope and extent of the relief afforded in the proceedings in the nature of *quo warranto* was sustained in *Albright* v. *Territory*, 13 N. Mex. 64, 79 P. 719, 11 Ann. Cas. 1165, and *State ex inf. Pope ex rel. Oberholser* v. *Mansfield Special Road District*, 299 Mo. 663, 253 S. W. 714."

Further, we mention that in the case of *West* v. *Town of Lake Placid*, 97 Fla. 127, 120 So. 361, the Supreme Court of Florida made a ruling with which the Alta Cliff case *conflicts*. In the West case it was said:

"In this instance, however, acting under at least color of authority from the Legislature found in the passage of Chapter 12990, *supra, this municipality apparently in good faith has taken the necessary steps to put its charter into operation, has elected its officers, has assumed the duties of local government under its charter, and has otherwise engaged in an active user of the franchise—all of which has been acquiesced in by the inhabitants of the municipality until the institution of this proceeding. Thus the municipality has become at least a municipality de facto. Tulare Irr. Dist.* v. *Shepard*, 185 U. S. 1, 22 S. Ct. 531, 46 L. Ed. 773; *Town of Constitution* v. *Chestnut Hill Cemetery Association*, 136 Ga. 778, 71 S. E. 1037; *Cooper* v. *Town of Valley Head*, 212 Ala. 125, 101 So. 874; 43 C. J. 98."

As there existed in Florida no constitutional impediment to the creation of a town extending to both sides of a body of water, and as the town in the present case was organized in good faith under color of law, we submit that

it became a *de facto* municipal corporation as to all of the territory included within its original limits, and that the District Court and the Circuit Court of Appeals committed no error in declining to follow the Alta Cliff case.

The Alta Cliff case *did not involve the rights of bondholders.* The petitioners say, nevertheless, that the Circuit Court of Appeals should have followed it and should have reversed the decree of the District Court. They are wholly unmindful, however, of the fact that the Florida Supreme Court *refused* to follow the Alta Cliff case in a suit *involving rights of bondholders,* and expressly declared that *a prior judgment of ouster was not retroactive* and *could not affect the bondholders' rights.* We refer to the recent case of *State ex rel. Fidelity Life Association* v. *City of Cedar Key* (122 Fla. 455), 165 So. 672, from which we excerpt the following:

> "The judgment in *quo warranto* relied on as a defense in this case *must therefore be construed* as having been rendered by the Circuit Court in the light of section 5109, C. G. L., *supra,* and *as not having any legal effect as an avoidance of the obligations validated or as an obstacle to the ordinary remedies available to a holder thereof for their enforcement against the municipality obligor thereon.*
>
> • • • •
>
> "The present writ of mandamus runs to the officers who would be required to execute the acts commanded to be done by them had the *quo warranto* judgment ousting them as officers of the City of Cedar Key never been obtained. *Such quo warranto judgment, as we have seen, must be construed as having a prospective operation only, in so far as past incurred and duly validated municipal bonds of the*

ousted or dissolved municipal corporation is concerned; no claim being made that the bonds in question are beyond the constitutional power of the state Legislature to authorize on the part of the municipality in any circumstances by mere legislation. The *judgment* in the *quo warranto proceeding is to be presumed, as a matter of law, not to call in question matters expressly or implicitly settled or adjudicated in the bond validation proceeding*, the result of which, under section 5109, C. G. L., section 3299, R. G. S., could not be subsequently called into question indirectly in any Florida court, whether by means of a *quo warranto* suit or otherwise, instituted in the name of the state, or in the name of any other party bound by the decree of validation through actual or virtual representation in that cause."

Petitioners further, in their brief, assert that the Circuit Court of Appeals was bound by the Alta Cliff decision under authority of *Hawks* v. *Hamil*, 288 U. S. 52, 53 S. Ct. 240, 77 L. Ed. 610. They apparently overlooked the fact that the Court there, speaking through Mr. Justice Cardozo, stated:

> *"No controversy is here as to the impairment of the obligation of a contract in violation of the restraints of the Federal Constitution,"*

whereas, the case at bar does involve the impairment of the obligation of contracts, and a violation of the provisions of the Federal Constitution.

Manifestly, if the Circuit Court of Appeals had followed the Supreme Court of Florida in the Alta Cliff case, it would have been led into error.

Nevertheless, the petitioners erroneously contend that the opinions of the Supreme Court of Florida in the

Mahood and Alta Cliff cases prevent the Federal Court from granting the relief prayed.

The bonds were issued upon the assumption of both the Town and the purchasers that they were legal and that the owners of property east of the Bay had approved the inclusion of their lands within the boundaries of the Town. The decisions of the Supreme Court of Florida, above mentioned, were not rendered until long after the rights of the bond holders had accrued. Prior to these decisions there was nothing in any statute of the state, or in any opinion of its court, that could possibly be considered as notice to purchasers of the happening of such a contingency. Both the Supreme Court of Florida and the United States Circuit Court of Appeals for the Fifth Circuit have held to this effect, and that the above decision must be construed as having a *prospective operation only, so far as past incurred and duly validated municipal bonds are concerned.*

POINT C.

Did the Town of North Miami become a *de facto* municipality throughout the entire territory described in its original articles of incorporation, and continue as such to have jurisdiction over the same until the judgment of ouster was entered? If not, does the legislative phrase "within said town" have a different and more far-reaching significance than the phrase "within its territorial jurisdiction," with respect to the levy and collection of a required tax?

In the case of *City of Albuquerque* v. *Water Supply Co.* (1918), 24 N. M. 368, 174 Pac. 217, 5 A. L. R. 519, 536, the Supreme Court of New Mexico, speaking through Mr. Justice Roberts, said:

"In the case of *Riley* v. *Garfield Twp.*, 58 Kan. 299, 49 Pac. 85, the court held that, *until the dissolution* of Garfield County in an action of *quo warranto* brought by the attorney general for that purpose, the acts of all its officers were valid and binding, notwithstanding the unconstitutionality of its organization.

"In Dillon on Municipal Corporations, 5th Ed., para. 67, the author said: '*Where a reputed corporation is acting under forms of law, unchallenged by the state, neither the nature nor the extent of any illegality in the organization can affect the existence of the reputed corporation . . . Even if the illegality in the organization arises from the unconstitutional character of the statute purporting to authorize the organization, it is nevertheless a corporation de facto, if its nature be such as is recognized by the general system of law of the state.*'

"In *Speer* v. *Kearney County*, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 749, the court said: '*We are unable to yield our assent to the broad proposition that there can be no de facto corporation under an unconstitutional law.* Such a law passes the scrutiny and receives the approval of the attorney general, of the lawyers who compose the judiciary committees of the state legislative bodies, of the Legislature, and of the governor, before it reaches the statute book. When it is spread upon that book, it comes to the people of a state with the presumption of validity. Courts declare its invalidity with hesitation, and after long deliberation and much consideration, even when its violation of the organic law is clear, and never when it is doubtful. Until the judiciary has declared it void, men act and contract, and they ought to act and contract, on the presumption that it is valid; and where, before such a declaration is made, their acts and contracts have affected

public interests or private rights, they must be treated as valid and lawful. *The acts of a de facto corporation or officer under an unconstitutional law, before its invalidity is challenged or declared by the judicial department of the government, cannot be avoided, as against the interests of the public, or of third parties who have acted or invested in good faith in reliance upon their validity, by an ex post facto declaration or decision that the law under which they acted was void.'*

"The case of *State ex rel. West* v. *Des Moines*, 96 Iowa 521, 21 L. R. A. 186, 59 Am. St. Rep. 381, 65 N. W. 818, was a direct attack by the state upon the constitutionality of the act providing for the annexation of contiguous territory by the City of Des Moines. The court held that the act was void as being a violation of the constitutional provision in regard to special and local legislation, yet the court held that *the act was color of law for the annexation and for the application of the principles of estoppel.*

"In the case of *Chicago, St. L. & N. O. R. Co.* v. *Kentwood*, 49 La. Ann. 931, 22 So. 192, the court held that the constitutionality of the legislative act providing the method of creating municipal corporations and the organization of the municipal corporation under the act could not be attacked collaterally by the defendant, resisting tax claimed by the corporation. See, also, *Coxe* v. *State*, 144 N. Y. 396, 39 N. E. 400; *State* v. *Gardner*, 54 Ohio St. 24, 31 L. R. A. 660, 42 N. E. 999; *Coe* v. *Gregory*, 53 Mich. 19, 18 N. W. 541; *McCain* v. *Des Moines*, 128 Iowa 331, 103 N. W. 979.

"Judge Cooley says (Cooley, Const. Lim. 363): 'In proceedings where the question whether a corporation exists or not arises collaterally, *the courts will not permit its corporate character to be questioned, if it appears to be acting under color of law,*

and recognized by the state as such. Such a question should be raised by the state itself, by *quo warranto* or other direct proceeding.'

"Color of the law has been defined to be 'the appearance or semblance, without the substance, right; mere semblance of legal right.' 11 C. J. 1225."

In the recent case of *Humphreys, et al.* v. *State ex rel. Palm Beach Company, et al.,* 108 Fla. 92, 145 So. 859, the Supreme Court of Florida held that a special act of the Florida Legislature of 1931, creating a new town out of territory formerly within the corporate limits of the Town of Boynton, and providing that the new municipality should assume fifty per cent of all the indebtedness of the old municipality, could not be given effect, as it impaired the rights of the holders of bonds of the Town of Boynton, issued prior to the severance. A writ of mandamus against the Boynton town officials to compel them to make provision for the payment of outstanding bonds was awarded by the Circuit Court of Palm Beach County. The bonds had been *validated prior* to sale, pursuant to the statute, and it was held that the validation proceeding forever set at rest any defense that might have otherwise been raised on the ground of irregularity or illegality, including questions of both law and fact, so far as those questions could be authorized by the Legislature to be put in repose by judicial proceedings set up for the purpose of having such matters determined, in advance of the issuance and sale of the affected securities. The case is directly in point here, and we quote from the opinion, by the Chief Justice, as follows:

"The effect of state and federal constitutional provisions forbidding enactment of law impairing the obligation of contracts is *to render ineffective any legislation impairing the taxing powers of municipalities to the detriment of creditors, by altering the boundaries or otherwise changing the charters of same, until adequate provision has been made for the protection of creditors* . . . The constitution of the United States is to the effect that all laws which may have been passed since bonds were issued, purporting to take away taxes necessary to meet the payments pledged to be made therefrom when the bonds were sold, are as to affected security holders, invalid as impairing the obligation of contract . . . The payment of contractual obligations, such as bonds, valid and enforceable in a particular way, and from specified resources, against public corporations when they were incurred, cannot be hampered, delayed, or avoided by either constitutional or statutory enactments subsequently adopted."

In the same case it was also said:

"*This court has long since held that all the laws which subsist, at the time and place of the making of a contract, and where it is to be performed, enter into and become a part of the contract made, as if they were expressly referred to and incorporated in its terms, including alike those laws which affect its construction, validity, enforcement or discharge. Com'rs of Columbia County* v. *King,* 13 Fla. 451, 474; *State ex rel. Dos Anigos* v. *Leham,* 100 Fla. 1313, 131 So. 533. *Indeed, such is the holding of the unbroken current of decisions of the Supreme Court of the United States and of other federal courts by which decisions we are bound, when called upon to adjudicate questions of constitutional law arising under Section 10 of Article 1 of the Constitution of the United States. Von Hollman* v. *Quincy,* 4 Wall. 535, 18 L. Ed. 403.

"Section 1 of Article 8 of the Charter of Boynton, Chapter 8918, Special Acts of 1921, under which relator's bonds were issued, contained a provision to the effect that the commission of the town should have the power to raise by tax and assessment upon all real and personal property within said town (as then defined by statute) all sums of money that might be necessary for the payment of interest on the town's bonded indebtedness, and to provide for the payment of its bonds or interest-bearing warrants at maturity, the same to be deposited in such interest paying bank or trust company as should be designated by the commission. The Special Acts of 1923, Chapter 9691, *changed the boundary of the Town of Boynton, but did not alter any other provisions of the old charter.* Therefore, at the time relator's bonds were issued by the old Town of Boynton, that town was vested with authority to levy, and it was thereby made its duty to levy a sufficient tax and assessment upon *all real and personal property within said town.** *In consequence thereof, these provisions of the statutes under which relator's bonds were issued entered into and became a part of the contractual obligation of such bonds, which no subsequent legislative act could constitutionally impair, under whatever guise it might be framed or enacted. State of Louisiana* v. *Police Jury,* 111 U. S. 716, 4 S. Ct. 648, 28 L. Ed. 574; *Hendrickson* v. *Apperson,* 245 U. S. 105, 38 S. Ct. 44, 62 L. Ed. 179; *County Court* v. *United States,* 105 U. S. 733, 26 L. Ed. 1220; *State of Louisiana* v. *New Orleans,* 102 U. S. 203, 26 L. Ed. 132; *Von Hoffman* v. *Quincy, supra; Com'rs of Columbia County* v. *King, supra; Dos Anigos* v. *Lehman, supra.*"

*"The legislative phrase 'within said town' obviously has a different and more far-reaching significance than if the phrase 'within its territorial jurisdiction' had been used. 'Within said town' means within it as it was defined a town by then existing provisions of law. 'Within its jurisdiction,' had such phrase or its equivalent been used, might be deemed to refer to whatever was within its territorial jurisdiction at the time of any particular required tax levy."

Where the Legislature of a state can organize or provide for the organization of municipal corporations, its recognition of a *de facto* municipal corporation by the enactment of special laws for the benefit of such municipal corporation, as in the case at bar, cures organic defects, if any, in connection with the formation thereof. This rule is well established, as was pointed out by the United States Supreme Court in the case of *Comanche County* v. *Lewis,* 133 U. S. 198, 10 Sup. Ct. 286, 33 L. Ed. 604, *supra,* where it is said:

> "It is universally affirmed that when a Legislature has full power to create corporations, its Act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization and makes a *de jure* out of what before was only a *de facto* corporation. It is true that there must be a *de facto* organization upon which this recognition may act, as was held in *State* v. *Ford County,* 12 Kan. 446; and in this case it appears from the findings, as well as from the testimony, that there was such *de facto* organization. There being this *de facto* organization, there was ample recognition by the Legislature."

It may be noted that the rule just referred to was invoked and applied by the Supreme Court of Oklahoma in the case of *Board of Commissioners* v. *Clarke and Courts,* 12 Okl. 208, 213, 70 Pac. 210, 211, where a *de facto* county of the State of Texas was transferred to Oklahoma and established as a county there, in such manner that the obligations of the old county in Texas were held to be binding upon the new county in Oklahoma. It was there said:

"In *Comanche Co.* v. *Lewis*, 133 U. S. 198, 10 Sup. Ct. 286, 33 L. Ed. 604, the Supreme Court of the United States has held that when a Legislature has full power to create corporations, its act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization, and making a *de jure* out of what before was only a *de facto* corporation. It follows, therefore, that Greer County, Texas, at the time the obligations sued on in this action were issued, was a *de facto* municipal corporation, and that its officers were *de facto* officers, invested with full power and authority to create said indebtedness. Being a *de facto* municipal corporation, its officers had the power to create indebtedness for lawful corporate purposes and it had the power and authority to levy and collect taxes to pay such indebtedness. *The power to levy and collect taxes to pay such indebtedness is not a grant of power to the muncipality as a corporate body, but it is a necessary and indispensable power that is vested in the inhabitants of the incorporated territory.* Hence the valid obligations created by the municipality must survive the dissolution of the corporation and must pass, with whatever public property it may possess, to the inhabitants who continue to reside under the new corporation within the boundaries of the municipal area, and in behalf of the inhabitants of which the debt was originally created. The decisions of the Supreme Court of the United States sustain this general doctrine."

In the case of *People ex rel. Gridley* v. *Farnham*, 35 Ill. 562, it was directly decided that legislative recognition of a town confirms its boundaries. In that case the Supreme Court of Illinois said:

"In the case of *Jameson* v. *People, ex rel.*, 16 Ill. 257, it was held by this Court that where a municipal

corporation has been recognized by enactments of the general assembly, all inquiry into the original organization of the corporation is precluded. It was further held, that in such cases, after long-continued use of corporate powers, and acquiescence of the public in them, the law will indulge in the presumption in support of their legal existence. An Act was adopted by the general assembly, at their session in 1857 (p. 1328), entitled 'An Act to extend the jurisdiction and powers of the president, trustees and constables of the Towns of Oswego and Newark, in Kendall County.' *The provisions of this act refer to and recognize this as an incorporation, and it, by name and in terms, confers additional powers upon the body.* The case of Jameson vs. The People, is decisive of this case, and by it this enactment precludes all inquiry into the regularity of its organization.

"The next question is whether the boundaries of this town were ever fixed and determined. The fifth section of the act authorizing such towns to become incorporated (R. S. 112) declares that, 'for the purpose of carrying the aforesaid provisions into effect, the said president and trustees shall have power to define the boundaries of such town, provided the same shall not exceed one mile square.' On the 20th of February, 1849, the board of trustees, by ordinance, did fix the boundaries of this town. It was again, in 1855, amended by another ordinance. As thus defined, it embraced the property in dispute. *This was the territory over which the president and trustees claimed and exercised jurisdiction, and the act of 1857 operated to confirm this claim as well as other matters of jurisdiction.* We are unable to perceive that there has been any usurpation of corporate franchises by the president and trustees in this case, and there was, therefore, no error in the judgment of the court below, and it is affirmed."

Therefore, while the conclusions reached by the Florida Supreme Court in the *Alta Cliff Company* case, *supra*, may have definitely and satisfactorily disposed of the question as to whether the lands lying east of Biscayne Bay could be taxed by the municipality for administration purposes *generally*, the rights of the bond holders to have the territory in question taxed for the retirement of their bonds was not, and could not have been, settled in that suit. The federal courts are certainly at liberty, under the Constitution of the United States, to determine for themselves that the property of the petitioners, east of the Bay, was such a part of the municipality, when the bonds were validated and issued, as to become subject to taxation for the retirement of those bonds.

POINT D.

The Federal Courts are at liberty to follow their own convictions as to the law, where constitutional questions as to the impairment of contracts are involved, and are not bound by the decisions of State Courts on such questions.

The case of *Clapp* v. *Otoe County*, 104 Fed. 473, *supra*, is so closely in point with the case at bar that we wish to quote at some length from Judge Sanborn's opinion therein, on the question here presented, as follows:

> "Notwithstanding all this, it is earnestly contended by counsel for the defendant in error that inasmuch as the Supreme Court of Nebraska decided, in *Morton* v. *Carlin*, that Nebraska City precinct was never legally constituted, and that, therefore,

all the bonds here in controversy were void, and inasmuch as it reached that conclusion by construing the statutes of that state, its decision is binding upon the federal courts, under the rule so often announced and applied in this court, that 'the national courts uniformly follow the construction of the constitution and statutes of a state given by its highest judicial tribunal, in all cases that involve no question of general or commercial law, and no question of right under the constitution and laws of the nation.' *Madden* v. *Lancaster Co.*, 65 Fed. 188, 192, 12 C. C. A. 566, 570, 27 U. S. App. 528, 536. There are, however, two exceptions to this rule as vital and as clearly established as the rule itself. *The first is that decisions of state courts which affect the validity of contracts between citizens of different states, which were made, or under which rights were acquired, before there was a judicial construction of the constitution or statute which seemed to authorize the contrgcts, are not obligatory upon the courts of the United States.* *Speer* v. *Board*, 88 Fed. 749, 760, 32 C. C. A. 101, 113, 60 U. S. App. 38, 57; *Burgess* v. *Seligman*, 107 U. S. 20, 27, 2 Sup. Ct. 10, 27 L. Ed. 359; *Pleasant Co. Tp.* v. *Aetna Life Ins. Co.*, 138 U. S. 67-72, 11 Sup. Ct. 215, 34 L. Ed. 864; *Louisville Trust Co.* v. *City of Cincinnati*, 47 U. S. App. 36-47, 22 C. C. A. 334, 76 Fed. 296, 301; *Jones* v. *Hotel Co.*, 30 C. C. A. 108, 86 Fed. 370, 373. *The other exception is that conceding that the action of a municipal or quasi municipal body was illegal, as held by a state court, still the question whether or not the illegal action of such a body, in the exercise of a power granted to it, constitutes any defense to bonds issued or contracts made pursuant to such action, and held by a bona fide purchaser, is a question of general jurisprudence, which it would be a dereliction of duty for a federal court to decline to consider and determine for itself.* *Speer* v. *Board*, 88 Fed. 749, 762, 32 C. C. A. 100, 114, 49 U. S. App.

38, 39; *Hartford Fire Ins. Co.* v. *Chicago, M. & St. P. Ry. Co.*, 70 Fed. 201, 203, 17 C. C. A. 62, 65, 36 U. S. App. 152, 156.

"The plaintiff in this case was a citizen of the State of New York. The bonds of this county were issued in 1886, and he purchased and paid for them in good faith in 1887. Without notice of any defect in their execution or in the preliminary proceedings which led to their emission. By this purchase he entered into a contract relation with this county, a citizen of the State of Nebraska, before any construction had been given by any court to any statute of that state, or to any action of the board of county commissioners of that county, which cast a shadow of suspicion upon the bonds he bought. By his purchase he acquired the right, under the Constitution and laws of the United States, to have his contracts interpreted, and his rights enforced, in a court of the United States, and *a fortiori* to the independent judgment of that court upon the legal questions his case presents. No decision of a state court rendered after his rights under these contracts had vested could forestall the judgment of a national court upon these questions, or deprive him of the right to invoke, or relieve a federal court of the duty to accord, its independent consideration and decision of his case. Much less could the decision of a state court, which studiedly ignored the rights of innocent purchasers of these bonds, and which was not rendered until ten years after they were bought, deprive the purchaser of the right to the independent opinion of the federal court to which he presents them. This question is not new in this court. It was considered more at length in *Speer* v. *Board*, 32 C. C. A. 100, 88 Fed. 760, and reference is made to the opinion in that case for a more extended discussion of it, and for a review of some of the authorities which sustain the proposition which we have announced."

Other authorities in point are McQuillin on Municipal Corporations, Vol. 2, page 1637, paragraph 757; *Birmingham Waterworks Co.* v. *Birmingham*, 211 Fed. 497, affirmed 213 Fed. 450; *Denver* v. *Mercantile Trust Co.*, 201 Fed. 790, 798, 120 C. C. A. 100, 161 Fed. 769; and *New York Electric Lines Co.* v. *Empire City Subway Co.*, 235 U. S. 179, 35 Sup. Ct. 72, 59 L. Ed. 184.

As was pointed out by the District Judge, in his opinion in the case at bar (R. p. 63), the impairment of the obligation of contracts cannot legally be accomplished by judicial decision any more than by legislation. Among the authorities cited and relied upon by the lower court in this connection is the case of *Pinegrove Township* v. *Talcott*, 19 Wall. 666, 679, 22 L. Ed. 227, wherein Mr. Justice Swayne, speaking for the United States Supreme Court, said:

> "The general understanding of the legal profession throughout the country is believed to have been that they were valid. The National Constitution forbids the states to pass laws impairing the obligation of contracts. *In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation.* Were we to yield in cases like this to the authority of the decisions of the courts of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery. *Butz* v. *Muscatine*, 8 Wall. 579, 19 L. Ed. 492."

In the case of *Murray* v. *Charleston*, 96 U. S. 432, 448, 24 L. Ed. 760, it was said:

> "*There is no more important provision in the Federal Constitution than the one which prohibits states from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away.* Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed."

Authority for the District Court to direct such action as was necessary to prevent a violation of Section 10, Article 1 of the Constitution of the United States, prohibiting the impairment of contracts, and the Fourteenth Amendment of the Constitution of the United States prohibiting a deprivation of property without due process of law, under such circumstances as those existing in the case at bar, will be found in *Mobile* v. *United States*, 116 U. S. 289, 6 S. Ct. 398, 29 L. Ed. 620, holding that if the taxing powers of the successor municipal corporation are less extensive than those of the old, the statutes authorizing the assessment of taxes which were in force when the obligation was incurred will be treated as still in force and officers of the new corporation will be directed to levy a tax thereunder. There, speaking through Mr. Justice Woods, the Supreme Court, said:

> "The laws which establish a local municipal corporation cannot be altered or repealed so as to invade the constitutional rights of creditors • • •

"Therefore, the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the Legislature, or if they are changed a substantial equivalent must be provided. *Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void. Von Hoffman* v. *Quincy,* 4 Wall. 535 (71 U. S. Bk. 18, L. Ed. 403); *Edwards* v. *Kearzey,* 96 U. S. 595 (Bk. 24 L. Ed. 793); *Ralls County Court* v. *United States and Louisiana* v. *Pilsbury,* 105 U. S. 733, 278 (Bk. 26, L. Ed. 1220. 1090); *Louisiana* v. *Mayor of New Orleans,* 109 U. S. 285 (Bk. 28, L. Ed. 936). These propositions receive strong support from the decisions of the Supreme Court of Alabama. *Comrs. of Limestone County* v. *Rather,* 48 Ala. 433; *Edwards* v. *Williamson,* 70 Ala. 145; *Slaughter* v. *Mobile County,* 73 Ala. 134.

"It follows that the contract by which, under authority of the Legislature, the City of Mobile agreed to levy a special tax for the payment of the principal and interest of the class of bonds to which those held by the plaintiff belong is still in force, and its obligation rests upon its legal successor, the Port of Mobile.

"All laws passed since the making of the contract, whose purpose or effect is to take from the City of Mobile or its successors, the power to levy the tax and pay the bonds, are invalid and ineffectual and will be disregarded. Mr. Justice Field, when delivering the judgment of this court in *Wolff* v. *New Orleans,* 103 U. S. 358 (Bk. 26, L. Ed. 395), said: 'The courts, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality, upon the faith

of which contracts were made with her and upon the continuance of which alone they can be enforced, can proceed, and by mandamus compel, at the instance of the parties interested, the exercise of that power, as if no such legislation has ever been attempted.' And so in *Ralls County Court* v. *United States,* 105 U. S. 733, (Bk. 26, L. Ed. 1220), it was said by the chief justice speaking for the court, that 'All laws of the state which have been passed since the bonds in question were issued, purporting to take away from the county courts the power to levy taxes necessary to meet the payments, are invalid; and under the well-settled rule of decision in this court the Circuit Court had authority, by mandamus, to require the county court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent.'"

It will be found that the case of *Perryman* v. *City Home Builders,* 121 Okla. 154, 248 Pac. 605, is in point with the foregoing. In that recent case, the Supreme Court of Oklahoma, speaking through Mr. Justice Lester, has discussed the question, in a lucid opinion, and cited the authorities in connection therewith. It was said:

"Under the provisions of the law providing for local improvements, bonds were issued and the assessments made for purpose of paying the bonds, and the state having made the assessments on property co-equal with other taxes for the purpose of meeting the bonded obligations, cannot by subsequent legislation strike down the rights of such lienholders without having made due provision for the protection of their liens. *They obtained certain rights under and by virtue of the statute which was in force at the time their contracts were entered into.* For the laws existing at the time of the issuance of the bonds, and under the authority of which they were issued, *'enter*

into and become a part of the contract in such a way that the obligation of the contract cannot thereafter be in any way impaired or its fulfillment hampered or obstructed by a change in the law.' *Moore, County Treasurer* v. *Otis, et al.* (C. C. A.), 275 F. 747, *supra; Wolff* v. *New Orleans,* 103 U. S. 358, 26 L. Ed. 395; *Ft. Madison* v. *Ft. Madison Water Co.,* 134 F. 214, 67 C. C. A. 142; *Hicks* v. *Cleveland,* 106 F. 459, 45 C. C. A. 429; *City of Austin* v. *Cahill,* 99 Tex. 172, 88 S. W. 542, 89 S. W. 552; *Seibert* v. *Lewis,* 122 U. S. 284, 7 S. Ct. 1190, 30 L. Ed. 1161; *Edwards* v. *Kearzey,* 96 U. S. 595, 24 L. Ed. 793; *Louisiana* v. *New Orleans,* 102 U. S. 203, 206, 26 L. Ed. 132; *Rolls (Ralls) Co. Court* v. *U. S.,* 105 U. S. 733, 26 L. Ed. 1220; *Louisiana* v. *Pilsbury,* 105 U. S. 278, 26 L. Ed. 1090; *Gibbons* v. *Hood River Irr. Dist.,* 66 Or. 208, 133 P. 772; *Oatman* v. *Bond,* 15 Wis. 22; *Barker* v. *Muchlin (Muehler),* 55 Wash. 411, 104 P. 637; *Goodale* v. *Fennell,* 27 Ohio St. 426, 22 Am. Rep. 321; *Ogden* v. *Saunders,* 12 Wheat. 213-302, 6 L. Ed. 606; *McCracken* v. *Hayward,* 2 How. 608, 11 L. Ed. 397; *Curran* v. *State of Arkansas,* 15 How. (U. S.) 304, 14 L. Ed. 705; *Planters' Bank* v. *Sharp,* 6 How. 327, 12 L. Ed. 447; *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 18 L. Ed. 403; *Mobile* v. *Watson,* 116 U. S. 305, 6 S. Ct. 398, 29 L. Ed. 620."

The case of *Ensley* v. *Simpson,* 166 Ala. 366, 52 So. 61, is in point with the foregoing. It was there said:

"It has been settled that the remedies for the enforcement of obligations assumed by municipal corporations which existed when the contract was made cannot be impaired by the Legislature, or, if they are changed, a substantial equivalent must be provided. 'Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and

leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void.' *Mobile* v. *Watson* (1886), 116 U. S. 289, 29 L. Ed. 620, 6 Sup. Ct. Rep. 398, and authorities there cited. To the same effect are decisions of this court: *Amy* v. *Selma* (1884), 77 Ala. 103; *Slaughter* v. *Mobile County* (1882), 73 Ala. 134; *Edwards* v. *Williamson* (1881), 70 Ala. 145; *Commissioner's Ct.* v. *Rather* (1872), 48 Ala. 433."

The principle here under discussion was applied in the case of *Meyer* v. *Brown*, 65 Cal. 583, 26 Pac. 281, wherein the court held:

"The bonds carried with them the pledge of an annual tax, for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, of 100 cents on the 100 dollars, 55 per cent of which is to be set apart and appropriated to an interest and sinking fund, to be applied to the payment of the annual interest upon the bonds, and to their final redemption. The tax was the chief security offered the creditors as an inducement to accept the bonds in payment of their claims. When the bonds for whose payment, with interest, provision was thus made, were issued and accepted by the creditors of the old city government, a contract was made as solemn and binding and as much beyond subsequent legislation as it would have been if made between private persons."

If the state court decided the principal question with which we are here concerned at all, it is manifest from the authorities cited that it did not decide the question correctly, and the District Court was without alternative but to reject the conclusions of the state tribunal, and to grant the bond holders relief to which they were en-

titled under the Constitution of the United States, and the Circuit Court of Appeals properly affirmed the final decree of the District Court.

POINT E.

Both the District Court and the Circuit Court of Appeals of the United States for the Fifth Circuit properly held that the petitioners were guilty of laches in connection with the issuance and validation of the bonds, so as to be estopped.

The record discloses that a statutory bond validation proceeding, resulting in a decree of validation, was instituted in the Circuit Court of Dade County, by the municipality, pursuant to Section 3296, *et seq.*, Revised General Statutes of 1920, as amended, now Section 5106, *et seq.*, Compiled General Laws of 1927, the said section being as follows:

> "3296. By Petition in the Circuit Court—When any county, municipality, taxing district, or other political district or subdivision, desiring to incur any bonded debt or to issue certificates of indebtedness, shall hold an election for that purpose in accordance with the provisions of the laws of this State controlling and regulating such elections, and the returns of such election shall show *prima facie* that such election is in favor of the issuance of said bonds or certificates, or when any county, municipality, taxing district, or other political district or subdivision shall adopt any ordinance or resolution, or take any other action required, by law, for incurring any bonded debt or issuing certificates of indebtedness under the laws of this State, such county, municipality, taxing district, or other political district or subdivision shall have the right, if it deems it expedient, to determine

its authority to incur bonded debt or to issue certificates of indebtedness and the legality of all proceedings had or taken in connection therewith, by filing a petition against the State of Florida in the Circuit Court of the county in which such election has been held or other proceedings have been had or taken."

If the petitioners had seen fit, they could have intervened in the validation suit for the purpose of raising any pertinent question as to the character of the territory included, and as to the regularity and validity of the incorporation proceedings. By reason of their failure to do so, they are estopped from asserting that the municipality was not at least a *de facto* organization throughout the territory which included their lands. We refer, in this connection, to the fourth official headnote in the case of *Weinberger* v. *Board of Public Instruction of St. Johns County,* 93 Fla. 470, 112 So. 253, as follows:

"Any matter or thing affecting the power of authority of the several political subdivisions mentioned in Section 3296, Rev. Gen. Stats. 1920, to issue bonds, or the regularity or legality of their issue, including questions of both law and fact, in so far as those matters or things could be lawfully prescribed, regulated, limited, or dispensed with by the Legislature in the first instance, or subsequently cured by a validating act, may be put in repose by a decree rendered pursuant to Section 3296, *et seq.*, Rev. Gen. Stats. 1920. So, also, may *constitutional rights or privileges which are designed solely for the protection of property rights of the individual concerned,* and which he may *waive* or with reference to which he may estop *himself,* or as to which the Legislature may lawfully limit the period of time within which such right or privilege may be exercised."

We wish to mention in the case of *Speer* v. *Board of County Commissioners,* 88 Fed. 749, 32 C. C. A. 101 (text 116), where it is said:

> "The interests of the public which depend upon such municipalities, the rights and relations of private citizens which become vested and fixed in reliance upon their existence, the intolerable injustice and confusion which must result from an *ex post facto avoidance* of their acts, commend the justice, and demand the enforcement, of the rule that *'when a municipal body has assumed, under color of authority, and exercised, for any considerable period of time, with the consent of the state, the powers of a public corporation, of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence.' National Life Ins. Co.* v. *Board of Education of Huron,* 27 U. S. App. 244, 259, 10 C. C. A. 637, 647, and 62 Fed. 778, 787; *Ashley* v. *Board,* 16 U. S. App. 656, 671, 8 C. C. A. 455, 461, and 60 Fed. 55, 61; *People* v. *Maynard,* 15 Mich. 463, 470; *School District No. 25* v. *State,* 29 Kan. 42, 49, 50; *City of St. Louis* v. *Shields,* 62 Mo. 247, 252; *State* v. *Carroll,* 38 Conn. 449, 471; *State* v. *Rich,* 20 Mo. 393, 396; *Clement* v. *Everest,* 29 Mich. 19, 23; *Donough* v. *Hollister,* 82 Mich. 309, 46 N. W. 782, 783; *Carleton* v. *People,* 10 Mich. 250; *Clark* v. *Com.,* 29 Pa. St. 129; *Com.* v. *McCombs,* 56 Pa. St. 436."

It is true that the judgment of ouster in the Mahood case *recited* that the territory east of the Bay never became a part of the municipality, but *that matter was not in issue,* and such recital was mere surplusage. 51 C. J. 361. This is true notwithstanding the fact that such recital by way of surplusage was the predicate upon

which the Supreme Court of Florida made its decision in the Alta Cliff Company case.

The rule is stated in American & English Encyclopedia of Law, 2d Edition, Volume 23, pages 628, 629, to be as follows:

> *"The judgment creates no new rights but merely declares existing ones. A judgment of ouster is not retroactive so as to affect or destroy acts done or contracts made prior to its rendition, and recitals to that effect in the judgment may be disregarded as surplusage."*

The case of *People ex rel. Mercer* v. *Zaring*, 305 Ill. 503, 137 N. E. 481, is in line with the foregoing. It was there said:

> "The court would not have been warranted in holding up the collection of the tax levied to pay the expenses of the operation of the school until the determination at some future time and in a different proceeding, whether the district was a legally organized district. In *Howard* v. *Burke*, 248 Ill. 224, 93 N. E. 775, 140 Am. Rep. 159, *it was held that a tax levied for a township high school by a de facto school of education which assumed to act under the authority of an election would not be enjoined in equity in the absence of fraud, even though a judgment of ouster was entered against the members of the board in a quo warranto proceeding after the tax was levied."*

In the case of *Bray* v. *Payne*, 210 Cal. 465, 292 Pac. 478, part of a judgment of ouster in a *quo warranto* pro-

ceeding against a municipality assuming to determine the status of territory involved upon ouster of the municipal franchise was declared to be beyond the legitimate issues in the proceeding, and was held void. It was there declared that the judgment was not, and could not be retroactive, and that it had no legal effect upon the prior exercise of municipal functions by the defendant. It was said:

> "It cannot be questioned that, by reason of the completion of the consolidation proceeding and the admitted exercise of the municipal franchise in said territory by the City of Los Angeles, the consolidated city is *de facto* as to its exercise of control over said territory. Whether its jurisdiction be *de facto* or *de jure* might have been questioned in an appropriate proceeding under Sections 803-810 of the Code of Civil Procedure (*Coe* v. *City of Los Angeles*, 42 Cal. App. 479, 183 Pac. 822). But such a proceeding was not instituted. Petitioner's contention is that such an inquiry is now foreclosed for the reason, it is claimed, that the question of whether said territory is incorporated or unincorporated is *res judicata*. The argument is grounded on the postulate that the judgment of August 9th, wherein said territory was declared to be and established as 'unincorporated territory of Los Angeles County,' has become final and binding upon the City of Los Angeles as the successor in interest of the City of Barnes City. *But the question whether said territory was incorporated or unincorporated was not within the issues which could be determined in said quo warranto proceeding. The only issue properly involved therein was whether the City of Barnes*

City was usurping, intruding into, or unlawfully holding or exercising the municipal franchise at the time of the commencement of the action, to-wit, on February 14, 1927. *People* v. *Perrin*, 56 Cal. 345, 349. *When the judgment of August 9th assumed to declare the status of the territory upon the completion of the ouster, it proceeded beyond the bounds of the legitimate issues of the complaint. That part of the judgment is void for all purposes. Baar* v. *Smith*, 201 Cal. 87, 255 P. 827. *It cannot operate as an adjudication of the status of the territory and must be disregarded.*

* * * *

"As above stated, the favorable vote on consolidation in the City of Barnes City was recorded before the *quo warranto* proceeding was commenced and thereafter was carried to completion. *The final judgment of ouster was not retroactive and had no legal effect upon the exercise of the municipal function prior to the entry of the judgment. Reclamation District No. 765* v. *McPhee*, 13 Cal. App. 382, 109 P. 1106. There is nothing in the Consolidation Act to prevent a *de facto* municipal corporation from effectually participating in an act of consolidation and we are referred to no precedent to the effect that it may not."

Therefore, it is respectfully submitted that the decisions of the Florida courts have not altered the situation, with respect to the question now under consideration.

IV.

CONCLUSION.

In the record of this case it clearly shows that the Circuit Court of Appeals did not err in affirming the judgment of the District Court, because:

1.

The decisions of the Supreme Court of Florida, upon the points of law involved in this case, are in conflict.

2.

The Circuit Court of Appeals was not bound to follow the decision of the Supreme Court of Florida in the *Leatherman, et al.* v. *Alta Cliff Company, et al.* case (114 Fla. 305, 153 So. 844), to the effect that lands east of Bay Biscayne, actually included within the corporate limits of the Town, were never *de jure,* nor *de facto,* in the Town of North Miami (formerly known as Town of Miami Shores), because:

(a) Said decision was mere *obiter dictum as to* the words "nor *de facto* in the Town."

(b) It was based on the decision in the case of *Mahood, et al.* v. *State ex rel. Davis, Attorney General, et al.,* 101 Fla. 1254, 133 So. 90, which was a *quo warranto* proceeding where the *only* question for determination was whether the lands east of Biscayne Bay included within the corporate limits of the Town of North Miami were *de jure* in the Town—and not whether the lands east of Biscayne Bay included within the corporate limits of the Town were *de facto* in the Town, and the decision was necessarily limited to this one question. (See *State ex rel. Landis* v.

Pravatt (110 Fla. 29), 148 So. 578, 580 and also, Corpus Juris Vol. 51, p. 361, Par. 84, quoted under Point B of this brief.)

(c) It was in conflict with earlier and later decisions of the Supreme Court of Florida. (See Town of *Enterprise* v. *State* (29 Fla. 128, 10 So. 740); and *West* v. *Town of Lake Placid*, 97 Fla. 127, 120 So. 361, and other authorities cited and quoted under Point B of this brief.)

(d) The rights of bond holders were not involved in the decision of the Supreme Court of Florida, in either the *Mahood* case, or the *Alta Cliff* case, and neither of said decisions is *res judicata* or binding upon the right of municipal bond holders.

(e) The Supreme Court of Florida has refused to follow the *Alta Cliff* case, in a suit *involving the rights of bond holders*, and expressly declared that a prior judgment of ouster was not retroactive and that a "*quo warranto* judgment must be construed as having a *prospective* operation *only*, in so far as past incurred and duly validated municipal bonds of the ousted or dissolved municipal corporation is concerned." (See *State ex rel. Fidelity Life Ass'n* v. *City of Cedar Key*, 165 So. 672, and other authorities cited and quoted under Point B of this brief.)

3.

The Circuit Court of Appeals did not err in refusing to follow the decision of the Florida Supreme Court in the *Leatherman, et al.* v. *Alta Cliff Company, et al.* case, *supra*, for the reason that to have followed said decision would have involved the impairment of the obligation of contracts, in violation of the restraints of the Federal Constitution. (See *Humphreys, et al.* v. *State ex rel. Palm Beach County*, 108 Fla. 92, 145 So. 859, cited and

quoted under Point C of this brief, and also, *Clapp* v. *Otoe County*, 104 Fed. 473, cited and quoted under Point D of this brief, and the other pertinent authorities cited and quoted under Point D of this brief.

4.

The Circuit Court of Appeals properly followed the decision of the Supreme Court of Florida in the case of *State ex rel. Fidelity Life Ass'n* v. *Cedar Key, supra,* and would have fallen into error had it attempted to follow the earlier decision in the case of *Leatherman* v. *Alta Cliff, supra.*

5.

It is not shown that the Circuit Court of Appeals has decided any important question of general law in a way probably untenable and in conflict with the weight of authority, and it affirmatively appears from the record that the decision of the Circuit Court of Appeals is not in conflict with any of the decisions cited by petitioners, except the case of Leatherman vs. Alta Cliff Company, which last mentioned decision was not controlling, but entirely out of harmony with other decisions of the Supreme Court of Florida, as well as the weight of authority elsewhere.

6.

The Town of North Miami became a *de facto* municipality throughout the entire territory described in the original Articles of Incorporation, and continued as such, to have jurisdiction over the same territory *until* the

judgment of ouster was entered, and the lands included within said *de facto* municipality became and are liable for the payment of municipal bonds issued, validated and sold prior to the judgment of ouster. (See authorities cited and quoted under Point C of this brief.)

7.

Both the District Court and the Circuit Court of Appeals of the United States for the Fifth Circuit properly held that the petitioners were guilty of laches in connection with the issuance and the validation of the bonds so as to be estopped. (See authorities cited and quoted under Point E of this brief.)

WHEREFORE, we respectfully submit that the Circuit Court of Appeals properly affirmed the final decree of the District Court, and that the judgment of the Circuit Court of Appeals should be affirmed.

T. J. BLACKWELL,
A. Y. CLEMENTS,
W. H. WALKER, JR.,
19th Floor Congress Bldg.,
Miami, Florida,

Solicitors for Town of North Miami, et al., Respondents, other than Brown-Crummer Investment Company.

APPENDIX.

Sections 1825, 1826, 1827, 1828 of the Revised General Statutes of Florida, 1920, providing for the incorporation of a town by mass meeting:

"1825. Number of inhabitants necessary to incorporate.—It shall be lawful for the male inhabitants of any hamlet, village or town in this State, not less than twenty-five in number, who shall have the qualifications hereinafter prescribed to establish for themselves a municipal government with corporate powers and privileges as hereinafter provided.

"1826. Distinction between cities and towns.—Whenever any municipal government is established, and it shall appear that there are three hundred registered voters within the limits hereby to be designated, it shall be and the same is hereby incorporated and designated as a city, entitled to the privileges of a city. All municipal governments having a less number of voters than those named above shall be and the same are hereby designated and declared incorporated towns, entitled to the privileges and rights of incorporated towns.

"1827. Publication of notice to assemble and organize.—Whenever any community of persons shall desire to form a municipal corporation under the provisions of this chapter, they shall, for a period of not less than thirty days, cause to be published in some newspaper of the county, or by posting in three places of public resort in the immediate vicinage, a notice requiring all persons who are registered voters, residing in the proposed corporate limits, which shall

be stated in this notice, to assemble at a certain time and place to select officers and organize a municipal government.

"1828. Proceedings of meeting.—At the same time and place designated in the notice aforesaid, the qualified electors present, being not less than two-thirds of those whom it is proposed to incorporate, and not less than twenty-five in number, shall select a corporate name and seal for the municipality which they propose to form, and designate by definite metes the bounds and territorial limits thereof. They shall then proceed to choose by a vote of a majority of the said electors a mayor and not more than nine and not less than five aldermen, who shall be known as the city council, and in whom shall vest the government of the city. There shall also be chosen at the same time and place, and in like manner, a city clerk and a marshal. The mayor, clerk and the marshal shall continue in office for the period of one year from the date of their election, or until their successors are elected and qualified: Provided, That the metes and bounds in this section shall not in any case apply to the fixing or establishing the boundary lines of towns and cities now or heretofore incorporated by the now existing laws of this State."